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No. 20 L 547
2-615 Motion

had at the hearing of the above-entitled cause, before the Honorable BRYAN S. CHAPMAN, DuPage County, Illinois, recorded via Zoom and transcribed by Kristin M. Barnes, Certified Shorthand Official Court Reporter, commencing on the 29th day of September, 2020.

-Cheryl Ann Barone, CSR#84-001503-

1 PRESENT:

2 FRANKLIN LAW GROUP, by
3 MR. RYAN ENDSLEY,

4 appeared on behalf of the Plaintiff;

5 SUDEKUM, CASSIDY & SHULRUFF, CHTD., by
6 MS. FLORENCE M. SCHUMACHER and
7 MR. FREDERICK J. SUDEKUM, III,

8 appeared on behalf of the Defendant.
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1 THE COURT: All right. Good morning, Counsel.

2 MR. ENDSLEY: Good morning, your Honor.

3 THE COURT: All right. This is 20 L 547, It's
4 Nice, Inc. versus State Farm Fire and Casualty.

5 We come on for a 2-615 motion in connection
6 with It's Nice's claim for coverage under the policy.

7 I've had a chance to read the motion, the
8 corresponding briefing, and I know there had been some
9 motions for leave to file supplemental authority. I
10 have had a chance to look at those motions.

11 I assume both parties are okay with each side
12 submitting their respective -- their respective briefs
13 in support of their -- their respective authority in
14 support of their positions.

15 Is that a fair characterization?

16 MR. ENDSLEY: Yes, your Honor. For It's Nice, at
17 least.

18 THE COURT: Sure.

19 MS. SCHUMACHER: State Farm as well, your Honor,
20 there's no objection.

21 THE COURT: All right. Why don't we go ahead and
22 have the parties state their names for the record.

23 MS. SCHUMACHER: Sure.

24 Florence Schumacher and Rick Sudekum here on

1 behalf of State Farm.

2 THE COURT: Uh-huh.

3 MR. ENDSLEY: Ryan Endsley on behalf of It's Nice,
4 Inc.

5 THE COURT: Okay. What I'd like to do here, guys,
6 I have spent considerable time with the -- with the
7 courtesy copies. I've got my tabs. Like I said, I've
8 read the authority. I've read the additional authority
9 submitted.

10 I don't necessarily need a regurgitation of
11 the positions already taken in the briefs. I feel like
12 I have adequately familiarized myself with the parties'
13 positions.

14 I do want to give the parties a chance to
15 make their record here. I appreciate the issue and
16 that it's kind of a fastly moving issue through the
17 courts right now, and, as a result, I want to give the
18 parties a chance a make their record.

19 That said, I don't necessarily need, you
20 know, sort of, your Honor, this is how insurance
21 policies work. I mean, tell me whatever you want to
22 tell me. I may have a question or two for the parties,
23 but I'll let you make your record first.

24 State Farm, it's your motion. I'll let you

1 go ahead if there's anything you want to add.

2 MS. SCHUMACHER: Sure, your Honor.

3 I am going to briefly run through our
4 argument again, trying to sort of work in some of those
5 cases that have come in more recently.

6 I understand that the court is familiar with
7 insurance policies in general, so we won't -- hopefully
8 won't belabor you with too much elementary insurance
9 law here.

10 Obviously, the plaintiffs know -- or the
11 court knows that the plaintiff is seeking to recover
12 for a business interruption loss resulting from the
13 COVID-19 pandemic and the executive orders.

14 In our view, there are basically two main
15 barriers to plaintiffs being able to state a cause of
16 action. The first is the lack of accidental direct
17 physical loss and the second is the virus exclusion.

18 The way I look at these, your Honor, it's
19 sort of like -- the lack of accidental direct physical
20 loss is like a 10-foot hurdle and the virus exclusion
21 is like a brick wall. So even if the plaintiffs could
22 plead accidental direct physical loss, which they
23 can't, they're going to run right into the virus
24 exclusion and there's not going to be any coverage for

1 that reason either.

2 THE COURT: That was my -- that was the one thing
3 I wondered a little bit about in reading your briefing,
4 more the structure of your brief.

5 MS. SCHUMACHER: Right.

6 THE COURT: You led with the virus exclusion, and,
7 to my mind, there's an insuring agreement here as a
8 preliminary matter and we only get to the virus
9 exclusion if the court finds that there is, in fact,
10 accidental direct physical loss to the property in the
11 first instance.

12 You would agree with that?

13 MS. SCHUMACHER: I would, your Honor.

14 THE COURT: Okay.

15 MS. SCHUMACHER: You know, the court is
16 familiar -- it's the trigger of coverage. I mean, just
17 like in a life insurance policy, until you have the
18 death of the insured, there's no coverage to begin
19 with.

20 It's the same for these policies. They're
21 property policies, so their triggering coverage is
22 accidental direct physical loss. You know, you can't
23 just skip this part. It's the trigger of coverage.
24 It's something that the plaintiff has the burden of

1 proof on.

2 So, in this case, the covered property is the
3 restaurant property, so the first question is, where is
4 the accidental direct physical loss pleaded, and our
5 response, obviously, is that it isn't.

6 So, you know, just looking briefly at the
7 complaint, you know, they allege that there was no
8 virus on the property and their accidental direct
9 physical loss argument is based on loss and use.

10 But, you know, my first point is, it has to
11 be accidental direct physical loss, and I think it's
12 undisputed that there was no difference to this
13 property physically on the day before these executive
14 orders were issued than there was on the day after, so
15 physically the property was exactly the same.

16 So where's the loss? Where's the loss
17 they're arguing? They're saying that loss of use is
18 sufficient, that they couldn't use the property in the
19 same way, and that somehow that constitutes accidental
20 direct physical loss to the property, and we disagree
21 with that position.

22 So we believe that the Illinois law and all
23 these cases that have recently come out correctly hold
24 that loss of use of property without any physical

1 change to that property cannot constitute accidental
2 direct physical loss.

3 THE COURT: Mr. Endsley, at the risk of stealing
4 your thunder, I'm going to ask Ms. Schumacher
5 why don't you go ahead and respond to the western
6 district of Missouri cases that were cited by It's Nice
7 where it looks like some district courts in the western
8 district have found, you know, sort of a lack of
9 definition in the policy for physical damage or loss
10 of -- you know, what are the factual distinctions in
11 those cases, if any --

12 MS. SCHUMACHER: Right, right.

13 THE COURT: -- as to why the court should not find
14 those cases persuasive here as opposed to some of the
15 cases you've cited?

16 MS. SCHUMACHER: Sure.

17 So the first thing I would say, the court
18 says there are courts in the western district of
19 Missouri. What we actually have is one court -- it's
20 the same judge in the two cases -- who has gone
21 essentially the other way on this accidental direct
22 physical loss question.

23 Those cases are factually distinguishable on
24 two main grounds. The first is that the plaintiffs in

1 those cases argue that they had virus on the premises.
2 So the plaintiff in this case has not even alleged that
3 there was any virus present.

4 The second distinction is in the policy
5 language. So the trigger of coverage in those
6 policies, in the Studio 417 and the other case, were --
7 I think I've got the exact language here -- accidental
8 direct -- or accidental physical loss or accidental
9 physical damage.

10 And so the court in Studio 417 felt that it
11 had to somehow -- you know, focusing on that
12 disjunctive *or*, the court found that it had to give
13 separate meaning to physical loss and physical damage.

14 That's not the case in our policy. There's
15 one trigger of coverage, which is accidental direct
16 physical loss to property.

17 We also have a virus exclusion, which wasn't
18 present in those cases, but I know the court is asking
19 me about physical loss.

20 So I would say the first and the most
21 important distinguishing factor is, obviously, the
22 pleading in this case -- I think it's in paragraphs, I
23 think, 25 and 36 of the complaint where the plaintiffs
24 specifically deny that they had any virus present on

1 premises.

2 And, again, I would disagree with Studio 417.
3 I'm not sure even in their presence a virus is enough.
4 Other courts have disagreed with that opinion as well,
5 but I think for our purposes in our complaint we have a
6 complaint that alleges the absence of the virus. And
7 then, obviously, we have a policy that doesn't have
8 that *or* in there that the Studio 417 court seemed to
9 think was determinative.

10 THE COURT: All right. Anything else you want to
11 add?

12 MS. SCHUMACHER: Just jumping briefly into the
13 virus exclusion, your Honor, in case we get there, we
14 have that anti-concurrent causation language which
15 broadly excludes coverage when a loss would not have
16 occurred in the absence of a virus.

17 That language, that anti-concurrent causation
18 language, has been upheld in Illinois. The virus
19 exclusion clearly applies in this case. There is no
20 requirement in that policy language that the virus be
21 physically present on the property, like plaintiff
22 alleges. They're just adding language to the exclusion
23 which isn't present. The exclusion needs to be applied
24 as written. It unambiguously excludes a broad range of

1 losses. Virus is one of them.

2 Oh, the argument about, you know, the
3 proliferation issue, that somehow those two
4 subparagraphs of the virus exclusion need to be read
5 together, that's just not correct. The virus portion
6 of that exclusion is separate. It says that loss is
7 excluded, current virus, bacteria, or other
8 microorganism.

9 So, again, I think it's -- I don't see how it
10 could possibly be ambiguous: I mean, this -- clearly
11 we have a too late chain of causation here. The virus
12 caused the executive orders which caused the loss and
13 it's excluded under the virus exclusion.

14 THE COURT: Okay. Mr. Endsley, do you want to
15 respond to anything that's -- do you want to respond
16 with anything that's not in your brief? Or if there's
17 a point or two you want to emphasize, I'm happy to give
18 you a chance to do so.

19 MR. ENDSLEY: Thank you, your Honor.

20 So I just wanted to highlight a couple of
21 things. In particular, we -- you know, the Studio 417
22 case, we have the same situation where State Farm
23 elected not to define physical loss or damage. And, in
24 this case, while counsel has pointed out that this

1 policy only says physical loss, that's really the
2 broader of the two. Physical damage is what's probably
3 more in line with what State Farm's position is, which
4 is that a physical loss or damage must be a structural
5 alteration.

6 And the fact is that I think the Illinois
7 courts have not limited themselves quite so much to
8 structural physical alteration as State Farm would like
9 the court to believe. In particular, it's sort of an
10 all squares are rectangles argument. They cite cases
11 which are saying, you know, a change in color or shape
12 or appearance to the property is a physical loss or
13 damage, which is true, but that's not the only type of
14 physical loss.

15 And I think sort of looking at the asbestos
16 cases really sort of points that out, and State Farm's
17 position really throughout the briefs has been that
18 Illinois law requires a physical alteration to the
19 structure, and that's just not really what Illinois
20 case law actually says.

21 The other thing I'd sort of like to
22 highlight -- and this impinges a little bit on both the
23 virus exclusion and the physical loss or damage -- and
24 that's sort of the nature of an exclusion. And I know

1 that this is, you know, kind of a basic insurance
2 issue, but the fact is that an exclusion exists to
3 exclude coverage which would otherwise be present.

4 A virus cannot cause physical alteration to
5 the building, as far as I'm aware. If there's a way
6 that it can be done, State Farm certainly hasn't
7 articulated it. So at least this policy, as written,
8 clearly seems to contemplate nonphysical alterations
9 which would otherwise be covered causes of loss.

10 And that's a problem for the policy in a
11 couple -- for State Farm in a couple of ways in that
12 State Farm wants to apply the virus exclusion where it
13 was not present. Even in the absence of a virus
14 exclusion, if the governor had never closed the
15 building, It's Nice could never have made a claim
16 for -- under this policy because the coronavirus
17 existed somewhere. You know, even if there is
18 absolutely no virus exclusion in a different policy
19 like that, there just wasn't anything affecting It's
20 Nice's property.

21 And separately, with the physical loss or
22 use, when you're reading the policy, a number of these
23 exclusions, including, you know, both the virus
24 exclusion itself as well as the government closure

1 exclusion, really does contemplate under the policy
2 exclusions for nonphysical, nonstructural altering
3 causes of loss.

4 And that, to me, reads -- particularly when
5 State Farm has elected not to define loss or -- you
6 know, physical loss, that's a problem for them because
7 the policies seem to exclude things which wouldn't be
8 covered anyway under State Farm's interpretation, and
9 yet there they are.

10 Reading the policy as a whole and
11 constructing the ambiguities in favor of coverage,
12 certainly at this point dismissal seems premature.

13 THE COURT: Counsel, do you have a response to the
14 virus exclusion argument that the -- as I understand
15 counsel's argument, it's that the virus -- if we were
16 to take State Farm's proffered definition of physical
17 as understood in insurance contracts, the virus
18 exclusion would never fit that definition because it's
19 never going to alter a physical structure.

20 I'm going to go to paragraph 23 of your
21 motion, page 10, where State Farm says, In cases
22 interpreting the word *physical* in insurance contracts,
23 *physical* is widely held to exclude alleged losses that
24 are intangible or incorporeal, such as detrimental

1 economic impact, unaccompanied by distinct demonstrable
2 physical alteration of property.

3 So how is the virus exclusion consistent with
4 that proffered definition of *physical*?

5 MS. SCHUMACHER: Well, my first response, your
6 Honor, is I'm not sure we should assume that a virus
7 could never alter a structure. We're not familiar with
8 every --

9 THE COURT: Fair enough.

10 MS. SCHUMACHER: -- virus in the world, so I think
11 that the exclusion -- you know, I look at it as sort of
12 a belt and suspenders approach. I mean, surely I think
13 this virus is not causing physical damage, but that
14 certainly doesn't mean that there's no virus that could
15 ever develop that doesn't cause physical damage and
16 bodily injury. We don't know that. So I think, in a
17 sense, that the insurer clearly wanted to exclude this
18 kind of loss.

19 I think in the event that there is some
20 unexpected virus that comes up in the future that could
21 cause physical damage, I think the insurer is well
22 within its right to, you know, exclude that in the
23 event that that might happen some day.

24 It's clearly in the policy. The insured was

1 aware of it. It's a broad exclusion. And, again, I
2 think their whole question is just based on the
3 assumption that all viruses are going to be like this
4 virus, and I just don't think that that's the case.

5 THE COURT: Counsel, Mr. Endsley, let me ask you a
6 question.

7 One of the things, as I've thought about this
8 case a little bit, I'm worried a little bit or I'm
9 concerned at least about, were the court to accept your
10 argument as to loss of use, I'm concerned about a
11 limiting principle or lack thereof in terms of what is
12 the underwritten risk here.

13 And there appears to be, to my mind,
14 different types of coverage available for loss of use,
15 whether it is, in fact, civil authority when you think
16 about the cases right after 9/11 around the World Trade
17 Center. There's a lot of case law coming down in the
18 southern district of New York in the second circuit
19 involving business interruption where civil authority
20 has retail shops shut down but you've got physical
21 damage to other property, ingress/egress sorts of
22 issues.

23 Without the loss of use, sort of, well,
24 there's physical accidental physical loss to property

1 if I can't access it, that strikes me, when I look at
2 the policy in its entirety, to be potentially a very
3 different risk than what may have been contemplated
4 here.

5 Is that a fair concern?

6 MR. ENDSLEY: So I think that is something of a
7 concern. But to alleviate that a little bit, we're
8 dealing with a fairly unique set of circumstances and I
9 think there sort of still is a principle here.

10 If the governor's orders hadn't actually
11 required closure, if they, you know, had limited how
12 many patrons you could have in the restaurant or if
13 the -- you know, the effect of the general governor's
14 orders to shelter at home had been to reduce income,
15 you know, if we were talking about loss of income,
16 that's not a covered cause of loss.

17 And, in fact, I think some of the cases cited
18 by State Farm sort of indicate what the -- what the
19 difference is -- and those would be the Anchor
20 [phonetic] and Keach [phonetic] cases. And,
21 particularly, those focused on the difference between
22 when something is actually completely closed down and
23 when it's merely suffered, you know, a loss of business
24 income, and there really is a significant difference

1 here.

2 And the other thing I would sort of add, as
3 far as a policy situation, is I think the tremendous
4 number of lawsuits we've seen from this is sort of an
5 indication that a lot of these insureds thought that
6 this would have been covered, something like this, and
7 learned only late in the game that it wasn't or at
8 least the insurance company thought it wasn't.

9 And I'd just sort of articulate again, you
10 know, the basic principle that ambiguities in the
11 policy are construed against the drafter. State Farm
12 was the one who got to say what this policy looked
13 like, State Farm was the one who got to draft the
14 language of the policy, and, frankly, had put a lot
15 more thought into it than any of their insureds.

16 So I think to say that, you know, this wasn't
17 in the contemplation of the parties, it was at least a
18 little bit. State Farm has a number of exclusions
19 which nearly but do not quite apply. They were able to
20 draft around this.

21 And, frankly, exclusions exist in certain
22 policies which do address this specific concern. We've
23 reviewed a couple of them from client -- from potential
24 clients who wanted coverage and actually saying that if

1 there's a government closure order because of a
2 pandemic, no coverage.

3 So there are ways for the insurer to protect
4 themselves from this, but in this case it's the insured
5 who really had this dropped on them unexpectedly and is
6 now having to litigate.

7 THE COURT: Well, certainly, obviously, companies
8 and businesses around the world and certainly the
9 country and certainly Illinois are faced with a
10 remarkable predicament through largely no cause of
11 their own, if at all, as a result of the pandemic.

12 Let me be very clear. I am not -- when I ask
13 the question about the limiting principle, I am not
14 suggesting that the court is trying to ascertain the
15 intent of the parties at this point. I'm simply trying
16 to ascertain whether or not there's a reasonable
17 interpretation on the other side.

18 But wouldn't your argument, Mr. Endsley, be a
19 bit stronger if the definition or if the insuring
20 agreement language said insure for all accidental
21 direct physical loss of covered property as opposed to
22 to?

23 In other words, it's talking about -- I'm
24 concerned that we're reading direct physical to

1 property. We're kind of just pretending that it
2 doesn't say what it -- what it clearly says and we're
3 kind of saying, well, loss of property or loss to
4 property, same thing, whatever.

5 Wouldn't you have a stronger argument if it
6 said loss of property?

7 MR. ENDSLEY: In this case, I'm actually not sure
8 that we would, your Honor.

9 It's Nice still has the property, but the
10 property suffered a loss of use and that was a loss to
11 the property. It's Nice hasn't -- you know, the
12 property isn't gone. It's Nice has, in fact, recently
13 resumed business operations --

14 THE COURT: So let me ask you a question.

15 If I said, when I think loss to the property,
16 I think the roof is blown off; okay? That's what I
17 think of just -- at the very least, at a superficial
18 level.

19 If you're telling me a closing of the doors
20 by executive order is a loss to the property, help me
21 understand why that's the same thing.

22 MR. ENDSLEY: Well, I think you're certainly
23 correct that, you know, when we think of -- that is
24 classic losses.

1 THE COURT: That is, to my mind, closer to a loss
2 of property. It's a functional loss of property, not
3 to property.

4 MR. ENDSLEY: I guess the best argument I can sort
5 of think of, just off the spur of the moment, relates
6 to the fact that the type of property it is is what
7 affected the loss and that's -- because it's a
8 restaurant, this was a different type of loss. If this
9 was just being used as residential housing, there is no
10 loss to the property.

11 So State Farm insured a particular type of
12 business and a particular -- that particular type was a
13 restaurant which was affected, and that impacted this
14 property. That was a loss to this specific property
15 rather than a removal.

16 So to some extent, you know, if it said *loss*
17 *of property*, that, to me, almost suggests that
18 something -- a little more of the structural alteration
19 argument State Farm prefers, which is almost that
20 something was removed from the property or just ceased
21 to exist on the property -- because it was burned up or
22 something -- whereas I think *to property* sort of
23 suggests that it's anything that affects, you know,
24 that business property. It wasn't just the -- you

1 know, this wasn't just a title policy or something like
2 that. This was a business coverage policy.

3 THE COURT: It doesn't say anything is physical;
4 right?

5 MR. ENDSLEY: It does say physical.

6 THE COURT: I mean, it's not any conceivable way
7 you're unable to use the property in the way you see
8 fit. It's got to be direct physical loss. And, I
9 guess, your view is loss of use, there's a physical
10 displacement; right? That's --

11 MR. ENDSLEY: Yes.

12 THE COURT: -- your position?

13 Okay. Ms. Schumacher, if there's anything
14 you want to respond to, I'll give you the last word.

15 MS. SCHUMACHER: Sure. There are many things.
16 I'm going to try to stick to a couple.

17 I think the Turek court actually discussed
18 that *physical loss* to concept and I think it held that
19 to implies contact and *physical* implies physical
20 contact, direct physical loss to property.

21 And I looked in the dictionary. They gave
22 examples like a right uppercut to the jaw or applying
23 varnish to a surface. Whatever theory they have about
24 their loss not being able to use the property, that

1 simply is not physical loss to that property.

2 And I just want to briefly touch on -- the
3 court is concerned about the breadth of their
4 interpretation. So the first thing they said is, well,
5 this is a different situation because the restaurant
6 was required to be closed.

7 I would point out that in the executive
8 orders they did not close restaurants. Restaurants
9 were permitted to stay open for takeout or delivery.
10 So regardless of whether they chose to close the
11 restaurant, even under their complaint, they weren't
12 required to. So this is not a situation where
13 restaurants were closed.

14 The second and more broad point I would make,
15 your Honor, is that under their theory of accidental
16 direct physical loss, let's just say after COVID is
17 over the restaurant is open until 1:00 a.m. There's an
18 ordinance that says restaurants have to close at
19 midnight now. According to their theory, they now have
20 a loss of income claim because the restaurant has to
21 close an hour early because, according to them, there
22 doesn't have to be any physical impact; it just has to
23 affect the use of their property.

24 So, again, I agree with the court's concern

1 that their interpretation is way too broad and it
2 brings many more things into coverage than are intended
3 under a property policy which covers accidental direct
4 physical loss and then loss of income once that's
5 happened. But you just can't skip that step.

6 And I think that's all I have. I know the
7 court is familiar with all of this and there was a lot
8 that was said, but I'd like to keep it as brief as I
9 can. So I think unless the court has any additional
10 questions, I think we've made our point.

11 THE COURT: I think we -- I just want to make sure
12 all the parties agree that regardless of the coverage
13 form under the all risk policy, everyone agrees that
14 direct physical loss is required; right?

15 MR. ENDSLEY: Yes.

16 THE COURT: That phrase, that is an insuring
17 agreement that attaches to all. You know, sometimes
18 these all risk policies, there's all these amendments,
19 you know, there's the general exclusions and then
20 there's the exclusions within the broad form coverage
21 and there's exclusions within that and those don't
22 apply to the general -- you know, so that was my review
23 of the policy, that there was no separate insuring
24 agreement, everything goes back to Section 1 property

1 insuring agreements, direct physical loss requirement.

2 MS. SCHUMACHER: Yes.

3 THE COURT: Okay.

4 MR. ENDSLEY: Yeah, I believe there was a little
5 bit of confusion that we were maybe trying to get
6 coverage under the civil -- civil authority provision,
7 but that was --

8 THE COURT: Well, as I understand your argument,
9 you'll take coverage wherever you can find it; right?

10 MR. ENDSLEY: Yes, that's correct.

11 And that all relates back to the all risk
12 direct physical loss.

13 THE COURT: Right. Okay. Very good. Thank you.

14 Okay. The court is in a position to rule on
15 this today. The question presented by a 2-615 motion
16 to dismiss is whether sufficient facts are contained in
17 the pleadings that, if proved, would entitle the
18 plaintiff to relief. That's Evers versus Edwards
19 Hospital, 247 Ill. App. 3d 717.

20 A motion to dismiss under Section 615 admits
21 all well-pleaded facts but does not admit conclusions
22 of law or conclusions of fact not supported by
23 allegations of specific fact.

24 Exhibits -- I assume the policy was, in fact,

1 attached to the complaint?

2 MS. SCHUMACHER: It was -- your Honor, it was
3 either attached or filed by agreement.

4 I have two different cases. One they
5 attached a partial policy and then --

6 MR. ENDSLEY: Yeah, I --

7 MS. SCHUMACHER: Was yours the partial policy?

8 MR. ENDSLEY: Yeah, I believe it was attached by
9 agreement.

10 MS. SCHUMACHER: Okay.

11 THE COURT: The court is --

12 MR. ENDSLEY: There was --

13 THE COURT: The parties are asking the court to
14 consider the policy, right --

15 MR. ENDSLEY: Yes.

16 MS. SCHUMACHER: Yes, your Honor.

17 THE COURT: -- for purposes of this motion?

18 All right. So the policy is an exhibit to
19 the complaint for purposes of this motion.

20 Exhibits are part of the complaint to which
21 they are attached and the factual allegations contained
22 within an exhibit attached to a complaint serve to
23 negate inconsistent allegations of fact contained
24 within the body of the complaint.

1 I say that because, in some ways, this
2 operates almost more like a 12(b)(6) than -- most 615's
3 are sort of, if you haven't pled this element, you
4 haven't pled that element, and this operates more sort
5 of a -- whether or not there is a claim upon which
6 relief can be granted based on the complaint itself.

7 And, for that reason, I point out simply that
8 the exhibits to the complaint, which, in this case,
9 includes the policy, the parties have asked the court
10 to consider that as well.

11 Okay. Having said all of that, the critical
12 language here, first, is the direct physical loss
13 language, and the court finds that direct physical loss
14 unambiguously requires some form of actual physical
15 damage to the insured premises to trigger coverage.

16 The words *direct* and *physical*, which modify
17 the word *loss*, ordinarily connote actual demonstrable
18 harm of some form to the premises itself rather than
19 force the closure of the premises for reasons
20 extraneous to the premises itself or adverse business
21 consequences that flow from such closure.

22 Defense counsel -- I'm sorry, the insurance
23 counsel points out here that Illinois courts have not
24 squarely addressed direct physical loss in this

1 context, but I do want to note in cases interpreting
2 the word *physical* in insurance contracts, *physical* is
3 widely held to exclude alleged losses that are
4 intangible or incorporeal in Illinois, such as
5 detrimental economic impact unaccompanied by a distinct
6 demonstrable physical alteration of the property.

7 That's One Place Condo, LLC, versus
8 Travelers, 2015 Westlaw, Northern District of Illinois,
9 applying Illinois law.

10 The other case here that, I think, is
11 particularly useful is, in fact, Judge Gettleman's
12 decision in the northern district of -- I want to get
13 this right -- Sandy Point Dental v. Cincinnati
14 Insurance. This is 2020 Westlaw 5360465 dealing with
15 very similar facts and similar policy language.

16 In this case, the court finds, just as in
17 that case, plaintiff simply cannot show any such loss
18 as a result of either inability to access its own
19 office or the presence of the virus on its physical
20 surface, the latter of which here plaintiff fails to
21 allege in its complaint.

22 I don't think that's in dispute. There's no
23 argument that the coronavirus was, in fact, on the
24 surface of the property. The plaintiff has not pled

1 any facts showing physical alteration or structural
2 degradation of the property, which is required to
3 trigger coverage under this all risks policy.

4 The court wants to note that in addressing
5 this insuring agreement argument, this holding is
6 consistent with other courts that have evaluated
7 whether the coronavirus causes property damage
8 warranting insurance coverage.

9 Again, I want to reference 20 L -- I'm sorry,
10 not 20 L. 2020 Westlaw 5360465. That's Sandy Point
11 Dental versus Cincinnati Insurance.

12 I want to further note that Social Life
13 Magazine versus Sentinel Insurance Company, denying a
14 motion for preliminary injunction because the
15 coronavirus does not cause direct physical loss;
16 therefore, no coverage was required. The coronavirus,
17 quote, damages lungs. It doesn't damage printing
18 presses, close quote.

19 Diesel Barbershop versus State Farm Lloyds,
20 2020 Westlaw 4724305, Western District of Texas,
21 August 13, 2020, granting a motion to dismiss because
22 the coronavirus did not cause a direct physical loss
23 and, quote, the loss needs to have been a distinct
24 demonstrable physical alteration of the property, close

1 quote.

2 I further want to direct the parties'
3 attention to Gavrilides Management versus Michigan
4 Insurance Company. This is a state court of Michigan
5 handing down a decision last month that was cited by
6 State Farm in this case explaining that direct physical
7 loss to property requires tangible alteration or damage
8 that impacts the integrity of the property and
9 dismissing the case because plaintiff failed to allege
10 that the coronavirus had any impact to the premises.

11 I want to point out that these are not
12 controlling cases for purposes of an Illinois state
13 court; however, the court finds that these cases just
14 cited are, in fact, consistent with Illinois courts
15 treating of physical damage under insurance policies.

16 And, of course, there are meaningful
17 differences at times between first and third party
18 policies and first and third policy claims; however,
19 the court finds that there is a consistent line of
20 reasoning by Illinois courts as far as what physical
21 damage must mean for purposes of insurance coverage in
22 this case.

23 In essence, to quote Judge Gettleman in the
24 Sandy Point Dental Case, plaintiff here seeks coverage

1 for financial losses as a result of closure orders.
2 And I don't think anybody really disagrees with that
3 here.

4 The coronavirus has not physically altered
5 the appearance, shape, color, structure, or other
6 material dimension of the property and, as a result, it
7 doesn't come within the insuring agreement and, as a
8 result, plaintiff has failed to plead a direct physical
9 loss, which is a prerequisite for coverage.

10 However, I do want to point out here that
11 even if, even if, plaintiff had, in fact, been able to
12 plead within the insuring agreement -- that this claim
13 comes within the insuring agreement, the court does
14 find that the virus exclusion applies.

15 Now, the virus exclusion, which is Exclusion
16 J under Section 1 of the policy, states as follows --
17 and there's important, what we'll call, lead-in
18 language that I want to direct the parties' attention
19 to. The lead-in language under Section 1 exclusions,
20 which applies to all coverage forms under this all
21 risks policy, all coverage forms incorporate Section 1,
22 the lead-in language states as follows: We do not
23 insure under any coverage for any loss which would not
24 have occurred in the absence of one or more of the

1 following excluded events.

2 We do not insure for such loss regardless of,
3 A, the cause of the excluded event; or, B, other causes
4 of loss; or, C, whether other causes acted concurrently
5 or in any sequence with the excluded event to produce
6 the loss; or, D, whether the event occurred suddenly or
7 gradually, involves isolated or widespread damage,
8 arises from natural or external forces, or occurs as a
9 result of any combination of these, and it begins to
10 list the exclusions.

11 So the virus exclusion is Exclusion J. The
12 heading, which does not control, says fungi, virus, or
13 bacteria. Paragraph 1 states, Growth, proliferation,
14 spread, or presence of fungi or wet or dry rot or, new
15 paragraph, 2, Virus, bacteria, or other microorganism
16 that induces or is capable of inducing physical
17 distress, illness, and disease.

18 For our purposes, those are the relevant
19 provisions of the virus exclusion that needs to be
20 addressed here. First, the court finds that the
21 growth, proliferation, spread, or presence is not
22 required for purposes of applying the virus exclusion
23 because that is in a separate paragraph designed to
24 address fungus or fungi. There are not just one but

1 two disjunctive *or*'s in between fungus and virus
2 because it goes fungus -- or states fungus or wet or
3 dry rot or and then a new paragraph starting with the
4 word *virus* enumerated as number two.

5 So the court finds that it doesn't have to
6 establish a growth of a virus, just simply the idea of
7 a virus, the fact that a virus that is capable of
8 inducing physical distress, illness, or disease.

9 Even if -- if, in fact, this was some kind of
10 physical -- accidental physical damage, physical loss
11 coming within the insuring agreement, the virus
12 exclusion applies because Subsection C of the lead-in
13 language says this virus exclusion applies whether
14 other causes, executive orders, acted concurrently or
15 in any sequence with the excluded event to produce the
16 loss.

17 Here, I think everyone would agree absent the
18 virus, absent the virus, there would be no executive
19 orders, and so because C says this exclusion would
20 apply even where the sequence of the ordering with
21 other causes isn't entirely known or isn't entirely
22 clear or happens one two or two one, it still applies.

23 Furthermore, whether or not a virus could, in
24 fact, alter the physical structure, I think that's a

1 much -- that's not entirely clear at all that a virus
2 could.

3 And that's plaintiff's -- or I'm sorry,
4 insured's argument is the virus exclusion doesn't make
5 any sense for a sort of physical alteration requirement
6 of physical damage -- or a loss of, I should say --
7 physical loss because a virus would never alter the
8 physical structure.

9 The court doesn't agree with that. Virus,
10 bacteria, and microorganisms can exist in, in fact, a
11 meaningful way, and I think there's a strain of thought
12 out there that at one time was dominant -- it still may
13 be true to a certain extent -- that this virus can
14 exist on surfaces.

15 So even if the loss of use because of
16 coronavirus could constitute, the virus exclusion would
17 still apply -- could constitute physical -- accidental
18 physical loss, direct physical loss, I should say --
19 the virus exclusion applies.

20 And so for those reasons, the court is going
21 to grant the motion to dismiss.

22 I want to point out -- or I do want to
23 address the authority provided by Harold's Chicken --
24 It's Nice, Inc., d/b/a Harold's Chicken. A couple

1 things, I think, are worth pointing out.

2 One is the State Farm language here -- not
3 only are those cases from the western district and, as
4 a result, they're not controlling, the court believes
5 or is of the opinion that the cases relied upon for its
6 ruling today are more consistent with Illinois law as
7 it exists with respect to this issue.

8 Furthermore, the policy language was
9 different in those western district cases. And that's
10 not to say that the result would be different if you
11 had identical language, but I do think that's different
12 language.

13 And, moreover, and perhaps importantly, the
14 court was evaluating a 12(b)(6) motion in which the
15 insureds in that case allege the presence of COVID on
16 the property. And, to the court's mind, that is a --
17 that's a meaningful distinction here.

18 And, again, there's no virus exclusion in
19 that policy that the court would have had to have
20 considered as well and we don't know what the court
21 would have done in that case.

22 But I do think, at least for purposes of the
23 insuring agreement argument, those cases are
24 distinguishable without regarding -- without, you know,

1 advising as to what the result would be in this court.
2 But I do think those are different cases and they need
3 to be treated differently as such.

4 And so, for those reasons, the court is going
5 to go ahead and grant the motion both with respect to
6 the insuring agreement argument as well as with respect
7 to the virus exclusion.

8 I do want to point out, for the record, the
9 insured does not seem to argue -- kind of seems to have
10 one foot in and one foot out on civil authority.
11 They're happy to find civil authority coverage if it
12 exists, but they're not specifically asking for it.

13 But I want to point out, for the record,
14 that, as noted above, the policy's civil authority
15 coverage applies only if there is a covered cause of
16 loss, meaning direct physical loss, again, going back
17 to direct physical loss to property other than the
18 plaintiff's property.

19 Just as the coronavirus did not cause direct
20 physical loss to plaintiff's property here, the
21 complaint has not and likely could not allege that the
22 coronavirus caused direct physical loss to other
23 property. By the policy's own terms, the civil
24 authority coverage then does not apply.

1 So with that having been said, I'm granting
2 the motion. You know, I'm kind of -- do the parties
3 want a dismissal with prejudice?

4 MS. SCHUMACHER: Your Honor, we are asking for a
5 dismissal with prejudice, the reason being their claim
6 is for the loss of income due to the executive orders
7 which is caused by the virus, and without alleging a
8 completely different kind of claim, there's no set of
9 facts that they're going to be able to allege that's
10 going to avoid that result.

11 The executive orders are full of references
12 to the virus. The chain of causation is strong. The
13 virus exclusion is present. And, again, the same thing
14 with the physical damage issue. There's no claim that
15 there was any structural alteration to the property.

16 So I think in this case, your Honor, on that
17 basis, I don't think there's any way they're going to
18 be able to plead around either of those issues, and so
19 we are asking for a dismissal with prejudice.

20 THE COURT: Mr. Endsley, any response to that or
21 are you in agreement that this is time for other minds
22 to evaluate this claim?

23 MR. ENDSLEY: Yeah, your Honor, that's probably
24 correct. I don't think we can change the pleading such

1 that -- to get around the issues that you're finding
2 are insurmountable.

3 THE COURT: I don't disagree. It is a 615, and so
4 I do want to just at least give the parties the
5 opportunity to request without -- whether or not I give
6 that is a different issue, but it sounds like the
7 parties are of one mind and the court is in agreement
8 that this dismissal for this type of a 615 motion is
9 and should be with prejudice, and the court will enter
10 such an order.

11 MS. SCHUMACHER: Thank you, your Honor.

12 THE COURT: Okay.

13 MR. ENDSLEY: Thank you, your Honor.

14 THE COURT: Thank you, guys. Thank you very much
15 for your time and energy on this. I want to commend
16 the parties. I know this is a very interesting issue
17 under very -- a very unique set of facts.

18 MS. SCHUMACHER: Thank you, your Honor.

19 MR. ENDSLEY: Thank you, your Honor.

20 THE COURT: Thank you.

21 (Which were all the proceedings had at
22 the hearing of the above-entitled
23 cause, this date.)
24

